In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 202

BURNHAM CHEMICAL COMPANY, A CORPORATION,
PETITIONER

v.

OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 113-116) is reported in 81 F. Supp. 911. The opinion of the Court of Appeals (R. 235) is reported in 181 F. 2d 288.

JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1950 (R. 236). A petition for rehearing was denied April 20, 1950 (R. 237). The petition for writ of certiorari was filed July 14,

1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether a suit to compel issuance of a permit to prospect for sodium, pursuant to section 23 of the Mineral Leasing Act, which is grounded on an allegation that the permit had been arbitrarily denied may be maintained where (a) the permit had been refused by the Commissioner of the General Land Office because the Geological Survey had found that the mineral content of the land made section 23 inapplicable and (b) the applicant did not appeal to the Secretary of the Interior from the Commissioner's action.

STATUTES INVOLVED

Section 23 of the Mineral Leasing Act approved February 25, 1920, 41 Stat. 447, provided:

> That the Secretary of the Interior is hereby authorized *and directed,* under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium *dissolved in and soluble in water, and accumulated by concentration,* in lands belonging to the United States for a period of not exceeding two years: * * *. [Italics added.] [1]

[1] The italicized words were deleted by the Act of December 11, 1928, 45 Stat. 1019. In its present form, sec. 23 is 30. U.S.C. 261.

Section 24 of the Act as amended December 11, 1928, 45 Stat. 1019, 30 U. S. C. 262, provides: [2]

> That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease * * *. * * * Lands known to contain valuable deposits of one of the substances enumerated in section 23 hereof and not covered by permits or leases shall be subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres. * * *

STATEMENT

Petitioner brought this suit to compel respondents to grant it a sodium prospecting permit and a sodium lease for the "Little Placer," a 10-acre tract in Sec. 24, T. 11 N., R. 8 W., S. B. M. (R. 2-28). According to the complaint, the permit and lease were denied arbitrarily by respondents' predecessors (R. 24-27). The District Court dismissed the complaint (R. 122) and the Court of Appeals affirmed (R. 236).

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[2] So far as this case is concerned, the amendments did not change the meaning or effect of sec. 24.

The facts are as follows:

In June 1928, petitioner filed with the Register at Los Angeles, California an application to the Commissioner of the General Land Office for a sodium prospecting permit on certain lands in Kern County, California. Among the lands included in the application was the Little Placer (R. 193-198).

The application was made pursuant to section 23 of the Mineral Leasing Act approved February 25, 1920, 41 Stat. 447, which as it then stood directed the Secretary of the Interior "to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for * * * sodium dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States * * *." However, section 24 of the Act provided that: "Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases * * * shall be held subject to lease * * *."

Under date of November 23, 1928, the Commissioner of the General Land Office notified the Register that (R. 229): "On October 25, 1928, the Geological Survey reported that the lands in Sec. 24, T. 11 N., R. 8 W., contain sodium salts in commercial quantities and are subject to entry only under lease." The Commissioner concluded (R. 231-232): "You will notify the Burnham Chemical

Company that inasmuch as the Survey has reported the land in Sec. 24, T. 11 N., R. 8 W., as subject to lease only, its application for prospecting permit is hereby denied as to said section, subject to appeal within 30 days from notice, in default of which the application will be rejected to that extent without further notice from this office."

In the same letter the Commissioner directed that a hearing be held by the Register between petitioner and the United States Borax Company, which had made an entry on the Little Placer under the mining laws (R. 231). Petitioner had protested the entry on the ground that the Little Placer was subject to disposition only under the Mineral Leasing Act (R. 200-201). The Borax Company had protested petitioner's application on the ground it had located the land as a placer mining claim and it did not contain minerals enumerated in that Act (R. 202-204).

Under date of December 14, 1928, the Register notified petitioner of the Commissioner's decision and of its right to appeal to the Secretary of the Interior (R. 227). Petitioner did not appeal from the denial of its application and the rejection became final on February 9, 1929 (R. 118). However, on January 16, 1929, petitioner applied for a sodium lease on the Little Placer, stating that the "land is valuable for sodium and subject to sodium lease as set forth in the Commissioner's letter of November 23, 1928 * * *" (R. 119, 233).

As a result of the hearing directed by the Commissioner, the Register recommended rejection of the lease application and granting of the patent (R. 99-109). The Commissioner affirmed the recommendation of the Register (R. 206-215) and on March 8, 1933, the Commissioner's action was affirmed by the Secretary of the Interior. 54 I. D. 183. In effect, the Secretary found that any sodium that might be found in the Little Placer had not been "accumulated by concentration" and so was not a mineral enumerated in the Mineral Leasing Act.

But on May 19, 1937, before the Borax Company received a patent, the Secretary directed the institution of adverse proceedings against its entry (R. 120) and, on April 28, 1943, found that before the company perfected its mining location the land was known to contain valuable deposits of sodium borates "accumulated by concentration." 58 I. D. 426. Accordingly, he ordered cancellation of the entry (R. 120-121).

After institution of the adverse proceedings, petitioner applied for reinstatement of its permit and lease applications (R. 120). When the application was rejected (R. 121), it brought this suit.

The grounds on which the trial court dismissed the suit (R. 113-116) may be summarized as follows:

Section 23 required the Secretary of the Interior to grant a prospecting permit to a qualified appli-

cant if the lands applied for came within that section. But section 24 provided that lands known to contain valuable deposits of any mineral enumerated in section 23 should be leased. In order to give effect to both sections, it must be held that the Secretary was not required to issue permits to prospect for a mineral which the land is known to contain. The Commissioner's decision that the Little Placer was known to contain sodium was neither arbitrary nor capricious. Moreover, by failing to appeal from that decision, petitioner failed to exhaust its administrative remedies. Since the Secretary is not required by section 24 to grant lease applications, the court cannot compel him to grant that of petitioner.

The Court of Appeals affirmed *per curiam,* stating (R. 235) that "The opinion of the district judge * * * seems to us to demonstrate the soundness of his conclusion."

ARGUMENT

As was held below, section 23 of the Mineral Leasing Act, which at the time of petitioner's application required the Secretary of the Interior to grant any qualified applicant a permit to prospect for sodium, comprehended only land whose mineral character was unknown. For when land is already known to contain valuable mineral deposits, it would be idle to permit "prospecting" for such minerals and unjust to accord a permittee the preferential rights which would ensue upon his "dis-

covery" thereof. As section 24 provides, that land is to be leased at the discretion of the Secretary.

By this suit petitioner sought to compel respondents to grant it a permit to prospect for sodium on the ground that their predecessors had arbitrarily denied its application therefor. But since the Commissioner had denied the permit because the Geological Survey reported that the land contained sodium in commercial quantities, the trial and appellate courts found petitioner's allegations without basis (p. 7 *supra*). For the law long since committed to the Director of the Geological Survey the "classification of the public lands and examination of the Geological Structure, mineral resources and products of the national domain." Sec. 1, Act of March 3, 1879, 20 Stat. 394, 43 U. S. C. 31. Obviously, action based on information from this source was not arbitrary or capricious.[3]

Moreover, as the courts below held, petitioner was barred from bringing this suit because it failed to exhaust its administrative remedies. Petitioner gives no reason why it failed to appeal within 30 days "in default of which" its application would be summarily rejected. No concurrent method of review was suggested. Accordingly, there is no

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[3] Petitioner's contention (Pet. 13-15) that the presence of sodium could have been disclosed only by prospecting is refuted by the Secretary's finding (R. 120-121), which is highlighted by petitioner's persistent efforts to obtain the Little Placer, that the report of the Geological Survey was entirely accurate.

substance to the contention (Pet. 11-13) that in fact it did appeal by applying for a lease and by participating in the hearing on the mining claim of the United States Borax Company. Since petitioner's lease application stated that the Little Placer contained valuable deposits of sodium, it conceded that a permit to prospect for that mineral could not be granted. Therefore, the filing of the application for a lease was not an appeal from the denial of the application for a permit. Neither was petitioner's participation in the Borax Company hearing. Since it could not obtain a lease of the Little Placer unless it successfully resisted the Borax Company's claim to title to that tract, its appearance in that hearing is attributable to its pursuit of the lease application.[4]

Petitioner's final contention (Pet. 15-17) that when the Secretary held invalid the mining entry of the Borax Company he acted arbitrarily in refusing it a lease unless it bid more than its competitors is equally unsubstantial. Possibly there

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[4] To support its assertion that in effect it appealed from denial of its permit application, petitioner points out (Pet. 8, 12) that this application was No. 045676 and that the Commissioner's decision affirming the Register stated (R. 215) that "045676 is held for rejection subject to contestant's right of appeal to the Secretary of the Interior within 30 days from notice." The want of substance in the assertion appears from the sentence that immediately follows: "Advise the parties hereof, and that if no appeal is filed within the time allowed, this decision will become final, *lease* application 045676 of Burnham Chemical Company will be rejected and the case will be closed without further notice." (Italics added).

would be some basis for the contention if, had the mining entry been invalidated in the hearing in which petitioner participated, it would have obtained a lease. But Section 24 did not require the Secretary, even though he held the entry invalid, to grant a lease, and petitioner concedes (Pet. 16) there is nothing in the record to show that at that time the Secretary had undertaken to grant a lease to petitioner. In the absence of such a commitment, the later refusal of the Secretary to exempt petitioner from the hazards of competitive bidding was quite correct.

CONCLUSION

The decision below is correct, and the case does not warrant review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF.

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